

76-918

Supreme Court, U. S.

FILED

FEB 9 1977

MICHAEL RODAK, JR., CLERK

**In the Supreme Court of the  
United States**

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**October Term 1976**

**No. 918**

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**TRIUMPH HOSIERY MILLS, INC.,**  
*Appellant*

**v.**

**COMMONWEALTH OF PENNSYLVANIA,**  
*Appellee*

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*On Appeal from the Supreme Court of Pennsyl-  
vania.*

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**MOTION TO DISMISS OR AFFIRM**

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**CONSTITUTION, FEDERAL:**

Article 1, §8, cl. 3, The Commerce Clause . . . . . 6, 8

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**STATUTE:**

**Pennsylvania:**

Act of March 4, 1971, P.L. 6, No. 2, §§401 et seq.,  
as amended, 72 P.S. §§7401 et seq. . . . . 3, 6

*Question Presented*

1

**QUESTION PRESENTED**

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Is the add-back of an amount equal to the deduction for the Pennsylvania corporate net income tax taken by the Appellant on its federal income tax return to its otherwise apportioned income violative of the Appellant's constitutional rights under the Commerce and Equal Protection and Due Process Clauses?

### SUMMARY OF ARGUMENT

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None of the issues raised by Appellant in its Jurisdictional Statement raise a substantial federal question. All of these issues were raised and argued before both the Pennsylvania Commonwealth Court and the Pennsylvania Supreme Court, and both of these Courts specifically dealt with and disposed of each and every one of these issues. Therefore, Appellant's appeal should be dismissed and the judgment entered by the Pennsylvania Supreme Court affirmed.

### STATEMENT OF THE CASE

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Appellant is a New York corporation. It holds a certificate of authority to do business in Pennsylvania. During 1971 it actually engaged in business activity in Pennsylvania and was liable for Pennsylvania corporate net income tax, Act of March 4, 1971, P.L. 6, No. 2, §§401 et seq., as amended, 72 P.S. §§7401 et seq.

Appellant duly filed its Pennsylvania corporate net income tax report for 1971. It computed its tax as follows:

Federal taxable income	\$ 1,835,771.00
Add: Pennsylvania corporate net income tax	151,281.00
<hr/>	
Income to be apportioned	1,987,052.00
Apportionment percentage	.642831
Income apportioned to Pennsylvania	1,277,338.00
Tax at 12%	\$ 153,280.56

In making this computation, Appellant added back to its Federal taxable income the amount of Pennsylvania corporate net income tax which it had taken as a deduction on its Federal income tax return and applied its apportionment percentage to the sum of these two figures in order to arrive at its taxable income for Pennsylvania corporate net income tax purposes.

The Pennsylvania Department of Revenue and Department of the Auditor General were in agreement with

Appellant's Pennsylvania corporate net income tax report except for the way in which Appellant added back the amount of corporate net income tax taken as a deduction on its Federal income tax return. The two taxing departments settled Appellant's corporate net income tax as follows:

Federal taxable income	\$ 1,835,771.00
Apportionment percentage	.642831
Income apportioned to Pennsylvania	1,180,090.51
Add: Pennsylvania corporate net income tax	151,281.00
	<hr/>
Pennsylvania taxable income	1,331,371.51
Tax at 12%	\$ 159,764.58

In making this computation the two taxing departments applied Appellant's apportionment percentage to its Federal taxable income and added the deduction for Pennsylvania corporate net income tax without apportionment, in accordance with the statute, to the result in order to arrive at Appellant's taxable income for Pennsylvania corporate net income tax purposes.

Appellant duly filed a petition for resettlement. The petition was refused. It then filed a petition for review with the Board of Finance and Revenue which was subsequently denied. Appellant duly filed an appeal to the Commonwealth Court of Pennsylvania at No. 1609 Commonwealth Docket 1973. After all facts were stipulated the Commonwealth Court held that the taxing departments were correct in adding back the corporate net income tax after applying Appellant's apportionment percentage to its Federal taxable income. The Common-

wealth Court also held that such add-back was not violative of either the Pennsylvania or U. S. Constitutions. The Court's opinion and order nisi was filed on September 5, 1975. The opinion and order are appended hereto as Exhibit A.

Appellant duly filed exceptions to the opinion, conclusions of law and order nisi of the Commonwealth Court. By final order entered January 13, 1976, the Commonwealth Court overruled Appellant's exceptions and entered judgment in accordance with its prior opinion and order nisi. This final order is appended hereto as Exhibit B.

Appellant duly filed an appeal to the Supreme Court of Pennsylvania at No. 66 May Term 1976. After oral argument, the Pennsylvania Supreme Court, in an opinion filed on October 8, 1976, upheld the decision of the Commonwealth Court. This opinion is appended hereto as Exhibit C.

Appellant then filed the instant appeal.

## ARGUMENT

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Appellant contends that the add-back of an amount equal to the deduction for the Pennsylvania corporate net income tax taken by the Appellant on its federal income tax return to its otherwise apportioned income violates its constitutional rights as guaranteed by the commerce clause (Article I, section 8, clause 3) and the equal protection and due process clauses (14th Amendment, section 1).

Appellant's first argument is that the failure to apportion the "CNI add-back" violates the commerce and due process clauses. The crux of its second argument is that the failure of the Commonwealth to apportion the "CNI add-back" results in some taxpayers' effective CNI tax rate being higher than other taxpayers' effective CNI tax rate. This, Appellant asserts, is a violation of the commerce and equal protection clauses.

In spite of the fact that in the abstract the Commonwealth's method of determining the add-back could exact a greater percentage of tax from a corporation which does a lesser amount of its business in Pennsylvania, the Commonwealth contends that this does not in itself violate the due process or commerce clauses of the Federal Constitution. See *Fox v. Standard Oil Company*, 294 U.S. 87 at page 99 (1935), wherein the Court stated:

"When the power to tax exists, the extent of the burden is a matter for the discretion of the lawmakers. The subject was fully considered in *Magnano Company v. Hamilton*, 292 U.S. 40, decided at

the last term. 'Even if the tax should destroy a business, it would not be made invalid or require compensation upon that ground alone. Those who enter upon a business take that risk.' *Alaska Fish Company v. Smith*, 255 U.S. 44, at page 48, quoted in *Magnano Company v. Hamilton*, page 46."

The Court does not have the power to strike down a tax on constitutional grounds simply because the tax burden imposed by the Legislature is heavy. The United States Supreme Court has many times dealt with this problem. See, for example, *Stewart Dry Good Company v. Louis*, 294 U.S. 550 (1935), *Alaska Fish Company v. Smith*, 255 U.S. 44 (1921), and *Magnano Company v. Hamilton*, 292 U.S. 40 (1934).

All of the CNI tax involved in the instant appeal arises because of the taxpayer's connection with Pennsylvania. If there was no connection with Pennsylvania, the taxpayer would not be subject to Pennsylvania CNI at all. Since all of the CNI tax arose because of Appellant's connection with Pennsylvania, there is no basis in logic for requiring the add-back of Pennsylvania CNI to be apportioned. The only rationale for apportionment is to determine a corporation's connections with the taxing jurisdiction and to subject to the taxing jurisdiction's tax that portion of the corporation's net income which it earned from exercising its franchise in Pennsylvania. Since all of the CNI tax was paid to Pennsylvania and since all of it was deducted by the taxpayer in computing his Federal taxable income, it should logically all be added back and taxed by Pennsylvania.

After determining that Sections 401(3) 1 and 401(3) 2 require the "CNI add-back" to be added back with-

out apportionment, the Commonwealth Court, in an opinion written by President Judge James S. Bowman, discussed the constitutional arguments raised by Appellant and dismissed them as follows:

"Anticipating the possibility that this Court might so conclude, appellant also raises a multifaceted constitutional objection to the statute as so construed. Citing the uniformity clause of the Pennsylvania Constitution,<sup>7</sup> and the federal equal protection due process and commerce clauses,<sup>8</sup> appellant contends that a denial of apportionment, even as to only a single component of the statutorily defined tax base, renders the Pennsylvania corporate net income tax constitutionally infirm.

"We need not address each of the four constitutional principles asserted. Within the parameters of this controversy they are collectively directed to the same question: Whether by denying a multistate corporation the right to apportion the 'add-back' of the federal deduction for the Pennsylvania corporate net income tax, do sections 401(3)1 and 401(3)2 create two distinct classes of taxpayers, and thereby discriminate against multistate corporations?

"The purposes of apportionment, on a constitutional level, are to prevent any single state from taxing more than its just share of a multistate corporation's income or property, and to preclude state government partiality towards purely intrastate interests. The proscription against allocation of the fed-

<sup>7</sup> Pa. Const. art. VIII, §1.

<sup>8</sup> U.S. Const. amend. XIV, §1 (equal protection and due process) and U.S. Const. art. I, §8, cl. 3 (commerce).

eral deduction/'add-back' frustrates neither purpose, and, in fact, affords a buffer against prospective allegations of reverse discrimination.

"The constitutional principles here raised dictate that all components of a particular tax base which are uniquely local in character are properly and constitutionally within the potential ambit of local taxation. In many cases, this 'localism' is predetermined by the situs of the tax base component (e.g. real property taxes) or by the restricted bounds of the taxpayer's domain (e.g. all of the taxpayer's business transacted solely within the taxing state), and resort to more detailed analysis becomes unnecessary. However, in local tax situations involving multistate enterprises, such further analysis often becomes constitutionally and practically imperative and, as in the case of the Pennsylvania corporate net income tax, the formulation of equitable and mathematically sound apportionment formulae is presumed to be the procedure most apt to satisfy this imperative. In other words, the practical goal of apportionment is to localize that which is not local by its very nature and, in so doing, to minimize or eliminate the potential for constitutional deficiency within a particular tax scheme. Where a particular component of a particular tax base has been localized prior to the application of apportionment formulae, apportionment serves no constitutional purpose, and may prove constitutionally debilitating.

"Sections 401(3)1 and 403(3)2 require that the federal deduction for only the *Pennsylvania* corporate net income tax be returned to the base figure

of federal taxable income in computing the taxable income for application of the Pennsylvania tax. Thus, this particular component has been localized prior to the application of the appropriate apportionment formulae. Apportionment has occurred in the first instance, that is, at the time when the multistate corporate taxpayer determines what portion of its *total* federal deduction for state taxes represents the *Pennsylvania* corporate net income tax. Further apportionment of this particular component of the tax base would be nugatory under the mandates of both the Pennsylvania and Federal Constitutions, and would likely have negative repercussions. Local corporations, who are expressly required to include 100% of their federal deductions for the Pennsylvania corporate net income tax within the tax base, could identify a 'double apportionment' so afforded multistate corporations as a clear violation of the very same constitutional provisions (excepting the commerce clause) here propounded by appellant.

"In conclusion, the failure of the Pennsylvania corporate net income tax to provide for the apportionment of the federal deduction for said tax is not violative of either the Pennsylvania or Federal Constitutions. On the contrary, this proscription guarantees equality of treatment to both local and multistate corporations subject to the tax." 21 Pa. Commonwealth Ct. 186, 190-193, 343 A.2d 710, 713-714 (1975).

The Pennsylvania Supreme Court affirmed the decision of the Commonwealth Court. In its opinion, written by Chief Justice Benjamin R. Jones, the Pennsylvania Supreme Court stated:

"... Our reading of the statute comports with the language and intent of the legislature and lends to it an impact which is unassailable on constitutional grounds.

"Apportionment is a necessary incident of the state's taxation of a multistate corporation. As we explained in *Commonwealth v. Rieck Investment Corp.*, supra:

" 'It is well settled that state taxation of a foreign corporation's intrastate business activities must proceed along such lines as not to infringe upon the due process, the interstate commerce or equal protection clauses of the Constitution of the United States. State taxation cannot reach income or property derived from business activities conducted by foreign corporations outside the state's border and over which the state has no jurisdiction. To satisfy the constitutional requirements and yet to permit states to tax foreign corporations on a basis which would bear a fair relation to the amount of local business done within their borders, the so-called apportionment or allocation formulas were devised. . . ' 419 Pa. at 57-58, 213 A.2d at 281. Obviously, those elements of a foreign corporation's tax base which are fairly allocable to the taxing state without apportionment need not be apportioned prior to imposition of the tax. The federal tax deduction 'add-back' is such an element. It represents only the corporate net income taxes due on the *portion* of 'taxable income' related to business activity in *Pennsylvania*. In short, it is but a percentage of Pennsylvania income. Every corporation transacting business in the Commonwealth may be taxed on 100%

of this localized element of the tax base. The result is non-discriminatory and uniform, as required by Article VIII, §1, of the Pennsylvania Constitution: 'The rate used . . . is the same for all corporations. The tax base to which this rate is to be applied is also identical. *It is the net income attributable to this State.*' *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 426, 184 A. 34, 40 (1936) (emphasis supplied). . . . ' Pa. , 364 A.2d 919, 922 (1976).

There were several amici curiae briefs submitted before both the Commonwealth Court and Pennsylvania Supreme Court. In addition, there were several amici curiae oral arguments before the Pennsylvania Supreme Court. All of the briefs and oral arguments adequately raised the constitutional issues involved and both Courts were well aware of the issues.

As the Pennsylvania Commonwealth Court pointed out in its opinion, if this add-back were to be apportioned, as Appellant is requesting, such treatment would result in the "clear violation" of both the Pennsylvania and United States Constitutions.

## CONCLUSION

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In effect, Appellant's Jurisdictional Statement does not raise any substantial Federal questions which were not already considered and disposed of by the Commonwealth and Supreme Courts of Pennsylvania. Hence, the Commonwealth submits that the appeal of the Appellant should be dismissed and the judgment of the Pennsylvania Supreme Court be affirmed.

Respectfully submitted,

EUGENE J. ANASTASIO

*Deputy Attorney General*

R. SCOTT SHEARER

*Deputy Attorney General*

*Counsel for Appellee*

## EXHIBIT A

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 IN THE COMMONWEALTH COURT OF  
PENNSYLVANIA
 

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 No. 1609 C. D. 1973
 

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Triumph Hosiery Mills, Inc.,

Appellant

v.

Commonwealth of Pennsylvania,

Appellee

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 Before:

Honorable James S. Bowman, President  
 Honorable James C. Crumlish, Jr., Judge  
 Honorable Harry A. Kramer, Judge  
 Honorable Roy Wilkinson, Jr., Judge  
 Honorable Glenn E. Mencer, Judge  
 Honorable Theodore O. Rogers, Judge  
 Honorable Genevieve Blatt, Judge  
 Argued: June 5, 1975

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*Opinion by President Judge Bowman filed September 5, 1975:*

Triumph Hosiery Mills, Inc. (appellant) is a New York corporation which transacts a part of its business in

Pennsylvania. By exercising its privilege to engage in business within this state, appellant is necessarily subject to the imposition of the Pennsylvania corporate net income tax.<sup>1</sup>

Subsequent to appellant's filing of its Pennsylvania corporate net income tax return for the year ending December 31, 1971, the Department of Revenue disagreed with the method employed by appellant in the computation of its tax liability, and settled the tax due to a higher amount. This action precipitated administrative review procedures culminating in the rejection of appellant's contention.<sup>2</sup> Hence this appeal. It is before us on stipulated facts which we adopt in this de novo appeal.

The Pennsylvania corporate net income tax is measured upon a tax base of "taxable income" which is defined in limine as the "taxable income for the calendar year or fiscal year as returned to and ascertained by the Federal Government . . . ."<sup>3</sup> There follow several provisos which are not germane to this controversy. The last sentence of section 401(3)1 is one of two statutory focal points of the parties' dispute.

"In arriving at 'taxable income' for Federal tax purposes . . . any corporate net income tax due to the Commonwealth pursuant to the provisions of this article shall not be allowed as a deduction and

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<sup>1</sup> Article IV of the Tax Reform Code of 1971, Act of March 4, 1971, P.L. 6, as amended, 72 P.S. §7401 et seq., henceforth referred to as Code.

<sup>2</sup> The procedures for settlement, resettlement and review are set forth in section 407 of the Code, as amended, 72 P.S. §7407.

<sup>3</sup> Section 401(3)1 of the Code, as amended, 72 P.S. §7401-(3)1.

the amount of corporate net income tax so due and excluded from Federal taxable income under the Internal Revenue Code shall not be apportioned but *shall be subject to tax at the rate imposed under this article.*" (Emphasis added.)

Initially, this provision requires taxpayers to "add-back", to their federal taxable incomes, the deductions taken on their federal returns for the Pennsylvania corporate net income tax.<sup>4</sup> Appellant disputes neither the clear meaning of this "add-back" requirement, nor its validity under constitutional principles. Rather, the parties disagree as to the appropriate time at which the federal deduction should be "added back" in computing the Pennsylvania tax base.

It cannot be gainsaid that the proscription against apportionment of the "add-back" is glaringly inappropriate within the context of section 401(3)1, since that subsection, by its own terms of introduction, refers only to corporations whose *entire* business is transacted in Pennsylvania. The concept of apportionment, for state tax purposes, is meaningless when applied to purely local corporations. In fact, appellant contends that, in view of its placement, the proscription against apportionment is so meaningless that we should simply deem it a legislative aberration, and ignore its existence. Appellant buttresses this contention by reference to the second statutory focal

<sup>4</sup> This perhaps resounds in confusion but, presumably, in computing their federal deductions for state taxes, corporate taxpayers approximate their potential liabilities for the Pennsylvania corporate net income tax. Then, to determine their actual liabilities for the Pennsylvania tax, section 401(3)1 requires the taxpayers to return this approximation to the tax base.

point of the parties' dispute, the language of section 401(3)2:

"In case the entire business of any corporation . . . is not transacted within this Commonwealth, the tax imposed by this article shall be based upon *such portion of the taxable income of such corporation . . . as defined in subclause 1 hereof . . .*"<sup>5</sup> (Emphasis added.)

Appellant argues that *because* section 401(3)2 defines the "taxable income" of multistate corporations in terms of "such portion of the taxable income . . . as defined in subclause 1 [section 401(3)1]", and that *because* the "add-back" of the federal deduction for the Pennsylvania corporate net income tax is an integral part of the subclause 1 definition of "taxable income", that, *therefore*, said "add-back", as well as the other components of the subclause 1 definition, must be apportioned in computing appellant's Pennsylvania taxable income. We agree with appellant's premises, but not with its conclusion.

Despite its (mis-)placement in section 401(3)1, we feel that the proscription against apportionment of the federal deduction/"add-back" cannot be disregarded in deference to appellant's perception of the "clear intent" of section 401(3)2. Rather, when read in conjunction with subclause 2 (section 401(3)2), the proscription against apportionment leads us to the opposite conclusion. We agree that the "add-back" of the federal deduction for the Pennsylvania corporate net income tax does be-

<sup>5</sup> 72 P.S. §7401(3)2. The remainder of section 401 delineates the factors to be utilized in determining the proper portion of the taxable income of a multistate corporation to be allocated to Pennsylvania.

come incorporated into subclause 2 by the latter's reference to "taxable income . . . as defined in subclause 1", but we cannot, as appellant has so conveniently done, terminate our analysis at that point. The proscription against apportionment is *also* an integral part of the subclause 1 definition of "taxable income", and must *also* be incorporated by reference into subclause 2. Thus, while subclause 2 provides a *general* license to a multistate corporation to apportion its "taxable income . . . as defined in subclause 1", that same definition of "taxable income" contains a *specific* prohibition against the apportionment of one component of said taxable income, namely, the "add-back" of the federal deduction of the Pennsylvania corporate net income tax. Even assuming that the two subclauses produce an irreconcilable conflict in their directions, the specific prohibition against apportionment must prevail over the general license to apportion.<sup>6</sup>

Therefore, we adopt the Commonwealth's interpretation of sections 401(3)1 and 401(3)2. When computing its tax base for purposes of the Pennsylvania corporate net income tax, a corporation whose entire business is *not* transacted in Pennsylvania may apportion its taxable income except insofar as said taxable income represents the "add-back" of that corporation's federal tax deduction for the Pennsylvania corporate net income tax.

Anticipating the possibility that this Court might so conclude, appellant also raises a multifaceted constitutional objection to the statute as so construed. Citing the

<sup>6</sup> Section 1933 of the Statutory Construction Act of 1972, 1 Pa. C.S. §1933.

uniformity clause of the Pennsylvania Constitution,<sup>7</sup> and the federal equal protection, due process and commerce clauses,<sup>8</sup> appellant contends that a denial of apportionment, even as to only a single component of the statutorily defined tax base, renders the Pennsylvania corporate net income tax constitutionally infirm.

We need not address each of the four constitutional principles asserted. Within the parameters of this controversy they are collectively directed to the same question: Whether by denying a multistate corporation the right to apportion the "add-back" of the federal deduction for the Pennsylvania corporate net income tax, do sections 401(3)1 and 401(3)2 create two distinct classes of taxpayers, and thereby discriminate against multistate corporations?

The purposes of apportionment, on a constitutional level, are to prevent any single state from taxing more than its just share of a multistate corporation's income or property, and to preclude state government partiality towards purely intrastate interests. The proscription against allocation of the federal deduction/"add-back" frustrates neither purpose, and, in fact, affords a buffer against prospective allegations of reverse discrimination.

The constitutional principles here raised dictate that all components of a particular tax base which are uniquely local in character are properly and constitutionally within the potential ambit of local taxation. In many cases, this "localism" is predetermined by the situs of the tax

<sup>7</sup> Pa. Const. art. VIII, §1.

<sup>8</sup> U.S. Const. amend. XIV, §1 (equal protection and due process) and U.S. Const. art. I, §8, cl. 3 (commerce).

base component (e.g. real property taxes) or by the restricted bounds of the taxpayer's domain (e.g. all of the taxpayer's business transacted solely within the taxing state), and resort to more detailed analysis becomes unnecessary. However, in local tax situations involving multistate enterprises, such further analysis often becomes constitutionally and practically imperative and, as in the case of the Pennsylvania corporate net income tax, the formulation of equitable and mathematically sound apportionment formulae is presumed to be the procedure most apt to satisfy this imperative. In other words, the practical goal of apportionment is to localize that which is not local by its very nature and, in so doing, to minimize or eliminate the potential for constitutional deficiency within a particular tax scheme. Where a particular component of a particular tax base has been localized prior to the application of apportionment formulae, apportionment serves no constitutional purpose, and may prove constitutionally debilitating.

Sections 401 (3) 1 and 403 (3) 2 require that the federal deduction for only the *Pennsylvania* corporate net income tax be returned to the base figure of federal taxable income in computing the taxable income for application of the Pennsylvania tax. Thus, this particular component has been localized prior to the application of the appropriate apportionment formulae. Apportionment has occurred in the first instance, that is, at the time when the multistate corporate taxpayer determines what portion of its *total* federal deduction for state taxes represents the *Pennsylvania* corporate net income tax. Further apportionment of this particular component of the tax base would be nugatory under the mandates of both the Pennsylvania and Federal Constitutions, and would likely have

negative repercussions. Local corporations, who are expressly required to include 100% of their federal deductions for the Pennsylvania corporate net income tax within the tax base, could identify a "double apportionment" so afforded multistate corporations as a clear violation of the very same constitutional provisions (excepting the commerce clause) here propounded by appellant.

In conclusion, the failure of the Pennsylvania corporate net income tax to provide for the apportionment of the federal deduction for said tax is not violative of either the Pennsylvania or Federal Constitutions. On the contrary, this proscription guarantees equality of treatment to both local and multistate corporations subject to the tax.

Accordingly, we enter the following

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ORDER

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NOW, September 5, 1975, unless exceptions are filed hereto within thirty (30) days, the Chief Clerk is hereby directed to enter judgment against Triumph Hosiery Mills, Inc. and in favor of the Commonwealth, in the amount of \$159,764.58. The Chief Clerk is further directed to mark said judgment "satisfied" inasmuch as the full amount of said judgment has been paid by Triumph Hosiery Mills, Inc.

(s) James S. Bowman  
James S. Bowman,  
President Judge

## EXHIBIT B

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 IN THE COMMONWEALTH COURT OF  
PENNSYLVANIA
 

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 No. 1609 Commonwealth Docket 1973
 

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Triumph Hosiery Mills, Inc.,

Appellant

v.

Commonwealth of Pennsylvania,

Appellee

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 FINAL ORDER
 

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AND NOW, January 13, 1976, the Exceptions of the Appellant, Triumph Hosiery Mills, Inc., are overruled. Final judgment is entered in favor of the Commonwealth of Pennsylvania and against Triumph Hosiery Mills, Inc. in the amount of \$159,764.58. Since Appellant has paid all of said amount, the Prothonotary is directed to mark said Judgment satisfied upon payment by Appellant of the Prothonotary's costs.

(s) James S. Bowman

P. J.

## EXHIBIT C

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 IN THE SUPREME COURT OF PENNSYLVANIA  
*Middle District*


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 No. 66 May Term, 1976
 

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Triumph Hosiery Mills, Inc.,

Appellant

v.

Commonwealth of Pennsylvania

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 Appeal from Order of Commonwealth Court at No.  
1609 C. D. 1973
 

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Entered: January 13, 1976

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 OPINION
 

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JONES, C. J. Filed: October 8, 1976:

The Pennsylvania corporate net income tax, Act of March 4, 1971, P.L. 74, No. 2, art IV, §401 *et seq.*, as amended, 72 P.S. §7401 *et seq.*, is imposed on corporations transacting business within the Commonwealth. It is levied for the privilege of doing business in Pennsylvania. *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa.

421, 184 A. 37 (1936). The tax base, called "taxable income," for computation of the tax is, essentially, federal taxable income to which the taxpayer "adds-back" any deduction for the Pennsylvania corporate net income tax taken on the federal return. Section 401(3)1 of the Act, *supra*, 72 P.S. §7401(3)1. Corporations transacting their entire business in the Commonwealth apply the tax rate to all their "taxable income," while those which are not purely local are taxed on only the portion of "taxable income" attributable to the state. This latter figure is determined through application of an apportionment percentage. Section 401(3)1, 2, *supra*, 72 P.S. §7401(3)-1, 2. In this appeal we are asked to decide whether a corporation whose entire business is not transacted in Pennsylvania may apportion that part of its tax base which represents the corporation's federal tax deduction for the Pennsylvania corporate net income tax.

The appeal is before us on an agreed stipulation of facts. Appellant, Triumph Hosiery Mills, Inc., is a New York corporation authorized to do business in Pennsylvania. During 1971 it engaged in business activity in Pennsylvania and was liable for Pennsylvania corporate net income tax. In its tax report for that year, appellant arrived at its tax base by adding to federal taxable income the amount of Pennsylvania corporate net income tax deducted on its federal income tax return. Appellant then apportioned the sum of these two items.

This computation was disputed by the Pennsylvania Department of Revenue and Department of the Auditor General. The two departments first applied appellant's apportionment percentage to federal taxable income. Then, the whole deduction for Pennsylvania corporate

net income tax was "added-back" in order to arrive at "taxable income." The method employed by the Commonwealth yielded \$6,484.02 more in taxes.

Thereafter, appellant filed a Petition for Resettlement which was refused. It then filed a Petition for Review with the Board of Finance and Revenue which was also refused, two members of the Board dissenting. On appeal to the Commonwealth Court appellant was again denied relief. This appeal followed.

Section 401(3) of the taxing statute provides:

" 'Taxable income.' "

1. In case the entire business of the corporation is transacted within this Commonwealth, for any taxable year which begins on or after January 1, 1971, taxable income for the calendar year or fiscal year as returned to and ascertained by the Federal Government. . . . In arriving at 'taxable income' for Federal tax purposes for any taxable year beginning on or after January 1, 1971, any corporate net income tax due to the Commonwealth pursuant to the provisions of this article shall not be allowed as a deduction and the amount of corporate net income tax so due and excluded from Federal taxable income under Internal Revenue Code *shall not be apportioned* but shall be subject to tax at the rate imposed under this article.

2. In case the entire business of any corporation . . . is not transacted within this Commonwealth, the tax imposed by this article shall be based upon such portion of the taxable income of such corporation for the fiscal or calendar year, *as defined in subclause 1 hereof.* . . ." (Emphasis supplied.)

This statute, like every enactment of the legislature, must be analyzed in accordance with the established rules of statutory construction. Particularly pertinent to the determination at hand is the principle "that a taxing statute must be strictly construed and any doubt or uncertainty as to the imposition of a tax must be resolved in favor of the taxpayer." *Commonwealth v. Rieck Investment Corp.*, 419 Pa. 52, 59, 213 A.2d 277, 281-82 (1965); Statutory Construction Act of November 25, 1970, P.L. 707, added December 6, 1972, P.L. 1339, §3, 1 Pa. C. S. §1928(b) (3). Of equal importance is the presumption "[t]hat the General Assembly does not intend a result that is absurd, impossible of execution or unreasonable." Statutory Construction Act, *supra*, 1 Pa. C. S. §1922(1). All the language of a statute must be given effect. "The Legislature cannot be deemed to intend that its language be superfluous and without import." *Daly v. Hemphill*, 411 Pa. 263, 273, 191 A.2d 835, 842 (1963). Additionally, it is mandatory, where possible, that we construe conflicting general and special provisions of a statute so that both may be given effect. Statutory Construction Act, *supra*, 1 Pa. C. S. §1933; *Appeal of Yerger*, Pa. , 333 A.2d 902 (1975); *Duquesne Light Co. v. Borough of Monroeville*, 449 Pa. 573, 298 A.2d 252 (1972). Finally, because appellant attacks the constitutionality of Section 401(3) as construed by the Commonwealth, we are mindful of our duty "to declare a statute constitutional if this can reasonably be done." *Commonwealth v. Girard Life Insurance Co.*, 305 Pa. 558, 566, 158 A. 262, 264 (1932). It is presumed "[t]hat the General Assembly does not intend to violate the Constitution of the United States or of this Commonwealth." Statutory Construction Act, *supra*, 1 Pa. C. S. §1922(3).

Our analysis begins with subclause 2 because appellant's business is not strictly local. Subclause 2 of the statutory definition contains a general direction to apportion "taxable income" "as defined in subclause 1. . . ." (Emphasis supplied.) It is clear, therefore, that the tax base definition in subclause 1 applies to *all* corporations transacting business in Pennsylvania.\*

Turning to subclause 1, we find that the federal tax deduction for Pennsylvania corporate net income tax is included in "taxable income," but in plain and specific language the subclause provides that the "add-back" "shall not be apportioned. . . ." (Emphasis supplied.) For corporations transacting business entirely in Pennsylvania this prohibition against apportionment is idle language. All the "taxable income" of such a corporation is subject to the state tax. *Commonwealth v. Northern Metal Co.*, 416 Pa. 75, 204 A.2d 467 (1964), *cert. denied*, 380 U.S. 944 (1965). As President Judge Bowman observed in the opinion of the court below, "The concept of apportionment, for state tax purposes, is meaningless when applied to purely local corporations." *Triumph Hosiery Mills, Inc. v. Commonwealth*, Pa. Commonwealth Ct. , 343 A.2d 710, 712 (1975). To escape superfluity, then, the prohibition must be con-

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\*Subclause 3 of Section 401 provides:

"In case the entire business of a corporation which has filed a timely election and has qualified to be taxed as a regulated investment company under the provisions of the Internal Revenue Code of 1954, as amended, is not transacted within this Commonwealth, the tax imposed by this article shall be based upon such portion of the taxable income . . . as defined in subclause 1. . . ." 72 P.S. §7401(3)3. (Emphasis supplied.)

strued, if possible, as a specific limitation on the general right to apportion granted in subclause 2 and available to corporations transacting business in Pennsylvania as well as in other states.

We conclude that such a construction is both possible and proper. We hold, pursuant to Sections 401 (3)-1 and 401 (3) 2, that the tax base of a corporation which does not transact its entire business in Pennsylvania must include, without apportionment, the corporation's federal tax deduction for the Pennsylvania corporate net income tax. Our reading of the statute comports with the language and intent of the legislature and lends to it an impact which is unassailable on constitutional grounds.

Apportionment is a necessary incident of the state's taxation of a multistate corporation. As we explained in *Commonwealth v. Rieck Investment Corp.*, *supra*:

"It is well settled that state taxation of a foreign corporation's intrastate business activities must proceed along such lines as not to infringe upon the due process, the interstate commerce or equal protection clauses of the Constitution of the United States. State taxation cannot reach income or property derived from business activities conducted by foreign corporations outside the state's border and over which the state has no jurisdiction. To satisfy the constitutional requirements and yet to permit states to tax foreign corporations on a basis which would bear a fair relation to the amount of local business done within their borders, the so-called apportionment or allocation formulas were devised. . . ."

419 Pa. at 57-58, 213 A.2d at 281. Obviously, those elements of a foreign corporation's tax base which are fairly

allocable to the taxing state without apportionment need not be apportioned prior to imposition of the tax. The federal tax deduction "add-back" is such an element. It represents only the corporate net income taxes due on the portion of "taxable income" related to business activity in *Pennsylvania*. In short, it is but a percentage of Pennsylvania income. Every corporation transacting business in the Commonwealth may be taxed on 100% of this localized element of the tax base. The result is non-discriminatory and uniform, as required by Article VIII, §1, of the Pennsylvania Constitution: "The rate used . . . is the same for all corporations. The tax base to which this rate is to be applied is also identical. *It is the net income attributable to this State.*" *Turco Paint & Varnish Co. v. Kalodner*, 320 Pa. 421, 426, 184 A. 37, 40 (1936) (emphasis supplied). See also *Columbia Gas Transmission Corp. v. Commonwealth*, Pa. , 360 A.2d 592 (1976).

The Order of the Commonwealth Court is affirmed.